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11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 SERGE OBUKOFF,

17 Defendant.  
18

No. SA CR 18-140 (A) -JLS

GOVERNMENT'S OPPOSITION TO  
DEFENDANT'S MOTION TO ADMIT  
STATEMENT

19  
20 Plaintiff United States of America, by and through its counsel  
21 of record, the United States Attorney's Office for the Central  
22 District of California and Assistant United States Attorneys Joseph  
23 T. McNally and Jeff Mitchell, hereby files its opposition to  
24 Defendant's Motion in Limine No. 2.  
25  
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1 This opposition is based upon the attached memorandum of points  
2 and authorities, the files and records in this case, and such further  
3 evidence and argument as the Court may permit.  
4

5 Dated: August 1, 2021

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

In United States v. Bakshinian, the primary case defendant relies upon, the district court found that a prosecutor's prior statement that "Bakshinian was a young man who is being used by [his coconspirator]" qualifies as a party admission under Rule 801(d)(2). See 65 F. Supp. 2d 1104, 1110 (C.D. Cal. 1999). Then the district court conducted a Rule 401/403 analysis and excluded the evidence holding "that the likelihood of confusion and waste of time outweighs the probative value of the statement" explaining that "the admission of a statement by the government in a prior case would raise substantial dangers of confusing the jury and wasting time." Id. at 1111. Next the court said the "defense is ordered to refrain from introducing or referring to the prior statement unless and until the Court rules in its favor." Id.<sup>1</sup>

This Court does not need to decide whether the prosecutor's statement qualifies as a party admission under Rule 801(d)(2).<sup>2</sup> Indeed, two cases that come to opposite conclusions regarding the application of Rule 801(d)(2) to a prosecutor's statement - Bakshinian and United States v. Zizzo, 120 F.3d 1338, 1351-52 (7th Cir. 1997) - agree that under circumstances similar to the case at bench, any such statements should be excluded under Rule 403.

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<sup>1</sup> At the pre-trial stage, the Court held that it could not complete a Rule 401 analysis. See Bakshinian, 65 F. Supp. 2d at 1104. But the court nevertheless denied the defendant's in limine motion on Rule 403 grounds.

<sup>2</sup> The government is not aware of the Ninth Circuit addressing this issue.

1        Indeed, in United States v. Zizzo, the Seventh Circuit noted  
2        that a prosecutor's prior statements do not generally qualify as  
3        party admissions under Rule 801(d)(2). See 120 F.3d at 1351 n.4.  
4        But the Seventh Circuit did not need to resolve that issue because it  
5        held that the district court was within its discretion when  
6        excluding, on Rule 403 grounds, the prosecutor's statements regarding  
7        a testifying cooperator and non-testifying cooperator who were part  
8        of a Chicago crime syndicate. See 120 F.3d at 1351.

9        Regarding the testifying cooperator, "during a hearing on the  
10       government's motion to revoke his plea agreement following his  
11       perjury" in a different case, the prosecutor "argued that the  
12       cooperator's testimony would be more difficult to sell to juries in  
13       the future." Id.

14       Regarding the non-testifying cooperator, the prosecutor "(1)  
15       submitted a memo to the probation office dubbing the cooperator 'an  
16       inveterate and unrepentant liar'; (2) sent the cooperator's attorney  
17       a letter stating that [the cooperator] was 'unworthy of belief'; and  
18       (3) argued to the court that [the cooperator] was a liar." Id.

19       Against the backdrop of other evidence that could be used to  
20       impeach the cooperators' truthfulness, the district court excluded  
21       the prosecution's statements because, among other reasons, they were  
22       minimally probative, they would likely mislead the jury, and they  
23       were cumulative. See id. 1352.

24       Like the courts in Bakshinian and Zizzo, this Court should deny  
25       Defendant's motion to allow use of the prosecutor's statement that  
26       "Mr. Drobot has proved himself [as] somebody who in my view is beyond  
27       redemption, somebody who even after being sentenced continues to  
28       deceive, continues to trick in order to advance his own agenda." The

1 minimum probative value of this statement is substantially outweighed  
2 by the unfair prejudice, risk of misleading the jury, and needlessly  
3 presenting cumulative evidence.

## 4 **II. LEGAL STANDARD**

5 Under Rule 401, evidence is relevant when (1) it has any  
6 tendency to make a fact more or less probable than it would be  
7 without the evidence; and (2) the fact is of consequence in  
8 determining the action. In other words, "[r]elevancy is not an  
9 inherent characteristic of any item of evidence but exists only as a  
10 relation between an item of evidence and a matter properly provable  
11 in the case." Huddleston v. United States, 485 U.S. 681, 689 (1988)  
12 (citing Advisory Committee Notes on Fed. R. Evid. 401).

13 Under Rule 403, a district court has discretion to exclude  
14 relevant evidence "if its probative value is substantially out-  
15 weighed by the danger of unfair prejudice, confusion of the issues,  
16 or misleading the jury, or by considerations of undue delay, waste of  
17 time, or needless presentation of cumulative evidence." Fed. R.  
18 Evid. 403. Thus, "[w]here the evidence is of very slight (if any)  
19 probative value, ... even a modest likelihood of unfair prejudice or  
20 a small risk of misleading the jury" will justify excluding that  
21 evidence. United States v. Hitt, 981 F.2d 422, 424 (9th Cir. 1992).

## 22 **III. ARGUMENT**

23 Defendant frames the issue at hand as a "credibility contest"  
24 between Mr. Drobot and defendant. Dkt. 197 at 5. Yet the  
25 government's case does not rely just on Mr. Drobot's uncorroborated  
26 testimony. Instead, the government is calling numerous fact  
27 witnesses, experts, and cooperators, as well as introducing thousands  
28 of pages of corroborating documentation to prove Defendant's illegal

1 conduct. Thus, the Court's Rule 401/403 balancing should be made  
2 against the backdrop of all the trial evidence.

3 When viewed through this lens, the prosecutor's statement that  
4 "Mr. Drobot has proved himself [as] somebody who in my view is beyond  
5 redemption, somebody who even after being sentenced continues to  
6 deceive, continues to trick in order to advance his own agenda," is  
7 of minimal probative value, and that probative value is substantially  
8 outweighed by unfair prejudice, risk of misleading the jury, and  
9 needlessly presenting cumulative evidence.

10 **A. The Probative Value Of The Prosecutor's Statements Are**  
11 **Minimal.**

12 The prosecutor's opinion, expressed at prior hearing, that Mr.  
13 Drobot is "beyond redemption" does not mean that Mr. Drobot cannot be  
14 truthful. After all, if Mr. Drobot testifies truthfully he may  
15 receive a benefit pursuant to a cooperation plea agreement, but that  
16 doesn't mean he has redeemed himself. The prosecutor's expressed  
17 opinion on redemption is not probative in any meaningful way.  
18 Moreover, the prosecutor's additional statements, that Mr. Drobot  
19 continued to deceive and trick in order to advance his own agenda,  
20 after he had already been sentenced, are simply statements about the  
21 evidence in the record of what Mr. Drobot did that lead to the breach  
22 of his plea agreement and the government charging him for a second  
23 time. They are not independent evidence of Drobot's false  
24 statements. The probative value of the prosecutor's statements are  
25 de minimus.  
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1           **B.     The Prosecutor's Statements Are Unfairly Prejudicial, Will**  
2           **Mislead The Jury, And Needlessly Present Cumulative**  
3           **Evidence.**

4           Even if the prosecutor's statements are admissible under 401,  
5 they should be excluded for violating Rule 403 for several different  
6 reasons.

7           First, all of the factual issues Defendant wants to get in  
8 through the prosecutor's statement are part of the record and  
9 available to Defendant for cross-examination. Defendant can cross-  
10 examine Mr. Dorbot with his plea agreement; his breach of that plea  
11 agreement; the charges stemming from conduct that resulted in the  
12 breach of Mr. Drobot's plea agreement; Mr. Drobot's second plea  
13 agreement; and Mr. Drobot's admissions to the Court in that second  
14 plea agreement.

15           Things might be different if the government had let Mr. Drobot's  
16 post-sentencing, illegal conduct slide. But it didn't. The  
17 government breached Mr. Drobot's plea agreement and charged him with  
18 wire fraud, money laundering, and criminal contempt. The  
19 prosecutor's statements regarding Mr. Drobot's conduct are needlessly  
20 cumulative, in light of all the evidence available to Defendant for  
21 cross-examination.

22           Second, the prosecutor's statements regarding Mr. Drobot  
23 significantly risk confusing the jury. Indeed, they suggest that the  
24 prosecutor's personal opinions about witnesses matter - they do not.  
25 See United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992)  
26 (criticizing prosecutor for "deliberately introduc[ing] into the case  
27 his personal opinion of the witnesses' credibility . . . . A  
28 prosecutor has no business telling the jury his individual  
impressions of the evidence.").

1        Additionally, as the district court in Bakshinian pointed out  
2 before excluding a prosecutor's prior statement, "a jury may have  
3 difficulty determining the probative value to attach to an argument  
4 by the prosecutor in a prior case . . . . instead of considering the  
5 statement as mere evidence, the jury could incorrectly conclude that  
6 it has an estoppel effect." See 65 F. Supp. 2d at 1110.

7        So here. Introducing the prosecutor's statements regarding Mr.  
8 Drobot significantly risks confusing the jury and leading them to  
9 believe that the government should be estopped from relying on Mr.  
10 Drobot or that Mr. Drobot's testimony cannot be relied upon - neither  
11 of which are accurate. The danger of confusing the jury is  
12 particularly acute where, as here, Defendant argues the prosecution  
13 is taking "inconsistent position to bamboozle a jury." Dkt. 197 at  
14 4.

15        Third, the prosecutor's opinion that Mr. Drobot is "beyond  
16 redemption" is certainly language that will unfairly prejudice the  
17 jury as to Mr. Drobot and the government's case. Critically, the  
18 truth, or not, of a criminal cooperator's redemption does not really  
19 matter. Nothing in Mr. Drobot's cooperation plea agreement discusses  
20 whether he must redeem himself. Mr. Drobot is obligated not to  
21 commit new crimes, to provide truthful information, and to testify  
22 truthfully. Whether Mr. Drobot can redeem himself - personally,  
23 spiritually, cosmically, etc. - goes well beyond considerations that  
24 are proper for a jury.

25        **C. Other Issues Defendant Raises Do Not Matter.**

26        While citing case law that supports the exclusion of the  
27 prosecutor's statements, defendant weaves a few issues into his  
28 argument that merit brief response.

1 First, defendant notes that it mentioned the prosecutor's  
2 statements about Mr. Drobot, without objection from the government,  
3 in his opening statement – as if that matters. It doesn't. Defense  
4 counsel is an experienced trial lawyer. He knew that he ran the risk  
5 of discussing evidence during his opening statement that the Court  
6 may exclude. Indeed, as all trial lawyers know, this is a key  
7 purpose of pre-trial motions in limine. Defendant filed his motion  
8 in limine on this issue a week into the trial. The fact that  
9 defendant's counsel gambled during his opening statement by  
10 suggesting to the jury that the prosecutor had personally concluded  
11 its key witness was not credible without first securing the Court's  
12 ruling as to its admissibility should carry zero weight in the  
13 Court's decision as to its admissibility now.

14 Second, defendant says the government prosecutor "is not free to  
15 argue inconsistent positions to bamboozle a jury." Dkt. 197 at 4.  
16 Sure. But the prosecutor did not say Mr. Drobot is incapable of  
17 testifying truthfully – he said Mr. Drobot was "beyond redemption" –  
18 those are not the same thing. Moreover, even if defendant's  
19 characterization is correct, prosecutors are not allowed to tell  
20 juries that they personally believe their cooperators are telling the  
21 truth. See Kerr, 981 F.2d at 1053. So Defendant's concern about  
22 "inconsistent positions" is illusory.

#### 23 **IV. CONCLUSION**

24 For the above reasons, the Court should deny Defendant's motion  
25 in limine No. 2.  
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